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Sawyer: Business Aspects of Pricing Under the Robinson-Patman Act

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BOOK REVIEW

Business Aspects of Pricing Under the Robinson-Patman Act. By Albert E. Sawyer: Little Brown & Company, Boston, 1963, pp. xvi, 514, \$22.50.

It may be considered unfair to base a book review on what the advertisements for the book recite about its purposes. Nevertheless, while the dust cover of *Business Aspects of Pricing Under the Robinson-Patman Act* by Albert E. Sawyer states that the book provides "the surest possible guide to pricing practices which comply with the law *and* made good business sense," (emphasis in original), a businessman without legal training who expects to find an analysis of the niceties of Robinson-Patman pricing problems to assist him in the practical formulation of daily pricing decisions may be disappointed by Mr. Sawyer's book.

Mr. Sawyer begins with a preliminary discussion of the meaning of "price" as used in Sections 2(a), (b) and (f) of the Robinson-Patman Act. Next follows a checklist of the statutory elements of a prima facie case under section 2(a) and the elements of the defense of cost justification. Chapter 1 closes with a classification of different types of injury to competition in terms of five categories of business situations affected by section 2(a). The five categories are keyed to diagrams in Chapter 2 which provide simple and practical visual aids.

Chapter 2 discusses some of the more important section 2(a) cases, which are grouped according to the aforementioned five categories. Chapter 3 is principally a further analysis of these same cases, but here the cases are classified by the type of price discrimination involved. In that chapter, the author divides price discrimination into eight categories, including quantity, volume, trade and functional discounts, *ad hoc* pricing, et cetera, and points out the different types of probable competitive injury and the availability of the defense of cost justification to each category. It should be mentioned that Chapters 2 and 3 are supplemented by extensive tables: Appendix A, which consists of all Federal Trade Commission proceedings brought under section 2(a) and their disposition from June 19, 1936, through November 30, 1961; and Appendix B, which is a chronological tabulation of complaints issued by the FTC under section 2(a) for the same period. Chapters 2 and 3, supplemented by Appendices A and B, come closest to providing a Robinson-Patman pricing guide for the businessman. Certainly these sections of the book are a valuable reference tool for the lawyer who is called upon by a businessman to advise on the legality—or risk—of price differentials.

Having dealt with what constitutes price discrimination under section 2(a), in Chapter 4, the author then comments extensively on the defense of cost justification contained in the proviso to section 2(a). Chapter 4 reflects Mr. Sawyer's considerable expertise in the field of cost justification¹ and is

¹ Mr. Sawyer is a former member of both the Federal Trade Commission's Advisory Committee on Cost Justification and the Attorney General's National Committee to Study the Antitrust Laws. He has also published articles on various aspects of Robinson-Patman Act accounting: e.g., *Counselling Clients in the Application of Cost Justification*

particularly valuable for its description of the separate functions of the lawyer and accountant in developing that defense. In addition, the point that the type of records needed in running a business may be of little subsequent use in court to justify a specific differential in price is well developed. The thoughtful reader, however, may wonder what purpose a dissertation of this length on cost justification is expected to serve in a book which appears as a practical guide to sound pricing policies. An accountant versed in the requirements of the cost justification defense should be able, as a matter of proper accounting, to supply the businessman with an opinion on the justification of a particular differential. The decision regarding which *type* of differential with which to begin is for the businessman. Undoubtedly, he would be assisted in making this decision by the materials in the first three chapters of the book and the appendices thereto. Given these circumstances and given its length, Chapter 4 would appear to be of more interest to the lawyer or accountant engaged in giving advice than to the person who must make the actual decision on prices.

The longest chapter, Chapter 5, considers pricing methods commonly employed by sellers in distributing their goods to buyers located at varying distances from the seller's plant or warehouse. The buyers in question are able to buy from competing sellers similarly located at differing distances from the point of delivery. "Point of delivery price differentials," as Mr. Sawyer aptly terms them, arise from one of the meanings of the word "price" as it is used in section 2(a). If "price" is defined as the amount the seller realizes on his sales to each buyer after all transportation allowances are deducted, any allowance for transportation costs constitutes a price discrimination forbidden by the Robinson-Patman Act. Under this theory, known as the "mill-net" theory, to avoid a price discrimination the seller would sell f.o.b. mill, thus permitting the geographically favored buyer to achieve the maximum advantage from his location in relation to his source of supply. As the author quite properly points out, in the situation where the competing buyers are equidistant from the seller (a situation which because of the structure of motor, rail and water freight rate schedules is a relatively common occurrence), freight absorption by the seller will not give rise to a *prima facie* case. Another concept of "price" in section 2(a) is the "buyer's cost" theory, under which each purchaser pays the same delivered price. Under this latter theory, there is held to be no discrimination between competing buyers because each pays an identical price for the same goods.

To the businessman who is not versed in the mill-net vs. buyer's cost corollary to the Robinson-Patman Act, it may be something of a surprise to discover that Robinson-Patman problems may not be immediately solved when all purchasers are charged identical prices for the same goods. However, as Mr. Sawyer points out in his summary to Chapter 5, the FTC has apparently abandoned its mill-net theory under section 2(a) and has "ceased to rely upon the Robinson-Patman Act in its freight absorption cases."²

Studies to Pricing Before a Complaint is Filed, 5 Antitrust Bull. 521 (1960); Cost Justification of Quantity Differentials, 1 Antitrust Bull. 573 (1956); Accounting and Statistical Proof in Price Discrimination Cases, 36 Iowa L. Rev. 244 (1951).

² Page 303.

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Considering the present status of point of delivery differentials, it is somewhat curious that Mr. Sawyer chose to devote fully one-third of his book to this area, when a more succinct presentation would have been quite adequate. Nonetheless, materials in Chapter 5 are well presented, interesting and readable.

The final chapter is devoted to speculation of possible future developments in three groups of problems. These include a possible alternative method of determining the legality of a price differential, efforts to obtain recognition of return on investment as an element of cost justification, and certain aspects of the section 2(b) defense of meeting competition. Section 2(b) problems have received considerable attention from appellate courts since the date of publication of Mr. Sawyer's book, but the other problems he discusses in Chapter 6 remain unsolved.

Business Aspects of Pricing Under the Robinson-Patman Act is the sixth in the Trade Regulation Series edited by S. Chesterfield Oppenheim. The book, together with a companion volume by Frederick M. Rowe⁸ which is more oriented toward legal analysis, provide an attractive and comprehensive research set for approaching Robinson-Patman problems. My principal criticism of Mr. Sawyer's book is that the continuity of the text is marred by extensive quotations from court and FTC opinions, and other published materials. If the purpose of the book actually is to provide a "guide to pricing practices which . . . make good business sense," such lengthy quotations from readily available source materials would seem to detract from the sort of simplified explanation required to unravel the complexities of the Robinson-Patman Act for the businessman without legal training. Despite its somewhat formidable price, Mr. Sawyer's book should prove a valuable addition to the library of an attorney whose antitrust practice includes the Robinson-Patman Act.

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⁸ Rowe, Price Discrimination under the Robinson-Patman Act (1962).